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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND PETER DAVILA,

Defendant and Appellant.

E032096

(Super.Ct.No. FVI 13245)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stephen H. Ashworth, Judge. Affirmed.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Robert L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

## 1. Introduction

Defendant Raymond Peter Davila appeals from a judgment convicting him of committing lewd and lascivious acts upon his younger sister and two of her friends. Defendant's sole claim on appeal is that the trial court erred in providing the jury with the consciousness of guilt instruction (CALJIC No. 2.03).

We reject defendant's claim because his false pretrial statements provided substantial evidence supporting the court's decision to instruct the jury with CALJIC No. 2.03. We affirm defendant's conviction.

## 2. Factual and Procedural History

One of the victims, defendant's sister (Sister), who was born in 1990, lived with her parents and three brothers, including defendant, who was born in 1980. Before Sister turned 10, the family moved from Victorville to Apple Valley.

In Victorville, on more than one occasion, defendant molested Sister by touching her "private parts." Once, defendant entered Sister's bedroom and touched her vagina with his hand. On another occasion, defendant told Sister to lie down on the bathroom floor. After Sister complied, defendant got on top of her and penetrated her vagina with his penis. At least three other times, defendant entered Sister's bedroom late at night and inserted his penis into her vagina. During those times, Sister said, "No," and tried to move her body away.

In Apple Valley, on at least one occasion, defendant touched Sister's vagina with his penis. While Sister testified concerning one incident in Apple Valley, she told

Detective Danielle French that there were two incidents, one in the bedroom and one in the bathroom.

From age five, V., who was born in 1989, was friends with Sister. V. frequently visited Sister's house in Victorville. On more than one occasion during these visits, Raymond molested V. by penetrating V.'s vagina or rectum with his penis. V. told Detective French that defendant molested her about five separate times.

Another one of Sister's friend, L., who was also close to Sister's age, visited Sister almost daily when she lived in Victorville. Once, while the two girls were in defendant's room, defendant entered the room and turned off the lights. He then pulled down L.'s pants and underwear. L. screamed because she thought that defendant was trying to rape her. L. felt defendant's hands on her legs. L. eventually escaped and ran outside.

All three girls did not report these incidents because they were afraid of defendant, who told them not to tell anyone. While being interviewed on another matter, however, V. mentioned to Detective French that she had been molested by defendant.

After interviewing V., Detective French also interviewed Sister and defendant. During his interview, defendant denied molesting V. and denied knowing L. Defendant, however, admitted touching Sister's vagina with his fingers and ejaculating in front of her.

The San Bernardino County District Attorney filed an information charging defendant with 10 counts of lewd or lascivious act upon a child under 14 years of age

(counts 1 through 9, and 11)<sup>1</sup> and two counts of forcible lewd or lascivious act upon a child under 14 years of age (counts 10 and 12).<sup>2</sup> In counts 1 through 5, the district attorney also charged defendant with engaging in substantial sexual conduct.<sup>3</sup>

The jury found guilty verdicts on all 12 counts and true findings on the enhancement allegations. At the subsequent sentencing hearing, the court imposed a total prison term of 32 years.

### 3. Discussion

Defendant claims the trial court erred in instructing the jury with CALJIC No. 2.03 based on the lack of evidentiary support.

In addition to attacking the merits of defendant's claim, the People contend that defendant waived his right to raise this issue on appeal by failing to object to the instruction below.

Defendant, however, argues that the court's instructional error affected his substantial rights, and, thus, should be reviewed on appeal despite the lack of an objection.<sup>4</sup> Defendant also argues that, because his trial attorney failed to raise an objection, he was denied his right to the effective assistance of counsel.

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<sup>1</sup> Penal Code section 288, subdivision (a). All further statutory references will be to the Penal Code unless otherwise stated.

<sup>2</sup> Section 288, subdivision (b)(1).

<sup>3</sup> Section 1203.066, subdivision (a)(8).

<sup>4</sup> See section 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, footnote 7.

We conclude that because the evidence supported the court's decision to give the instruction, defendant's rights were not detrimentally affected or violated.

The trial court instructed the jury, as follows:

"If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Preliminarily, we note that the California Supreme Court repeatedly has rejected claims that consciousness of guilt instructions, including CALJIC No. 2.03, violate due process by bolstering the prosecution's theory or lessening the prosecution's burden of proof.<sup>5</sup>

The law requires only that the record contains evidence to support the instruction.<sup>6</sup> "The giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. The falsity of a defendant's pretrial statement may be shown by other evidence even when the pretrial statement is not inconsistent with defendant's testimony at trial."<sup>7</sup>

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<sup>5</sup> See *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Breaux* (1991) 1 Cal.4th 281, 304, citing *People v. Crandell* (1988) 46 Cal.3d 833, 871.

<sup>6</sup> *People v. Kelly* (1992) 1 Cal.4th 495.

[footnote continued on next page]

The record in this case contains ample evidence that defendant made false statements to Detective French. At the start of the interview, defendant repeatedly denied any wrongdoing. He denied knowing L. and denied touching V. He told Detective French that he had not touched Sister. Later in the interview, as Detective French continued to question defendant concerning Sister, defendant admitted engaging in digital penetration, but denied any penile penetration. Defendant explained that he only showed Sister his penis and masturbated in front of her. Defendant also explained that, when he ejaculated, the fluid landed on the floor.

The falsity of defendant's initial denials was evident from defendant's subsequent admissions. Despite defendant's reluctant admission, the jurors could have considered defendant's earlier statements as revealing a consciousness of guilt. Defendant's initial denials, therefore, justified the inclusion of the instruction in the charge to the jury.<sup>8</sup>

Defendant's persistent denials of molesting V. and L. also provided grounds for giving the instruction. The jury could have viewed defendant's insistence on not remembering L. as deliberately misleading. The jury could have found that defendant's statements were false and self-serving in light of the other evidence presented at trial. Both V. and L. testified that defendant had molested them.

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*[footnote continued from previous page]*

<sup>7</sup> *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103.

<sup>8</sup> See *People v. Kelly*, *supra*, 1 Cal.4th at page 531; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 795-796.

Based on testimony from Sister and Detective French, the jury also could have found that defendant's descriptions of his contact with Sister were willfully false or misleading. Sister told Detective French that, on about five separate occasions, defendant penetrated her vagina with his penis. Sister also told French that, contrary to defendant's account of ejaculating on the floor, during one particular occasion, Sister had to wipe some fluid off of her body.

The evidence presented at trial indicated that defendant deliberately lied or misled Detective French to minimize his culpability. From defendant's false and misleading statements, the jurors reasonably could have inferred a consciousness of guilt. The trial court, therefore, properly instructed the jurors that they could consider the statement for such purpose by giving CALJIC No. 2.03.

#### 4. Disposition

We affirm defendant's convictions.

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s/Gaut  
J.

We concur:

s/Ward  
Acting P. J.

s/King  
J.